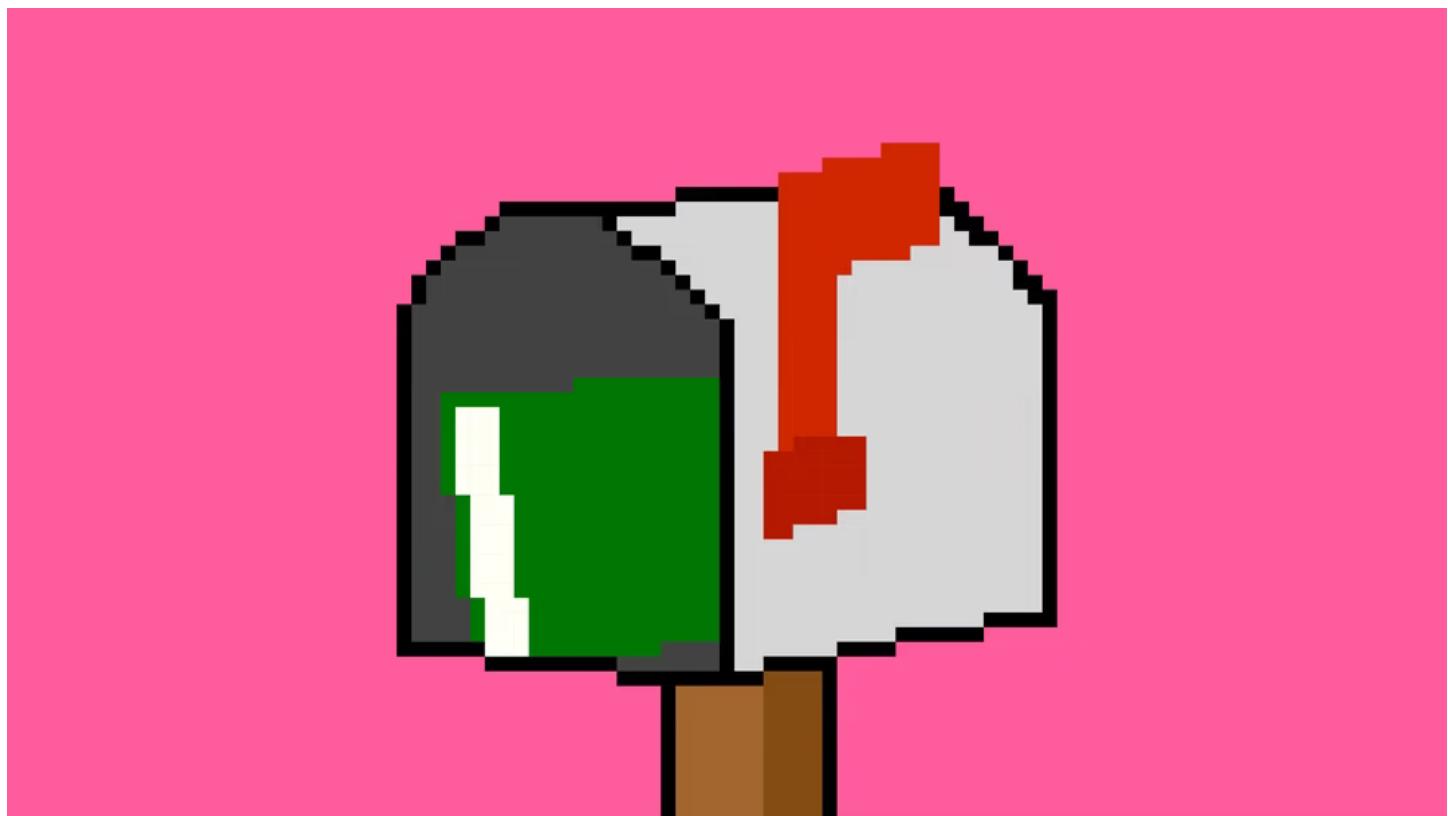


# In the Fight Over E-books, It's Publishers vs. Librarians - The Atlan...

By Dan Cohen

## Libraries Need More Freedom to Distribute Digital Books

But publishers are working hard to prevent that.



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Last week, a district court judge in New York ruled on [\*Hachette Book Group, Inc. v. Internet Archive\*](#), a case that is likely to shape how we read books on smartphones, tablets, and computers in the future. Although the case hinged on technical details of copyright law, the source of the conflict is much less abstract. It's a story about the halting, uneasy transition of books from paper to digital formats, and the anxiety of publishers and frustration of librarians about that change. The decision—which was in favor of the publishers—will add to librarians' frustrations. It will impoverish readers across the country seeking access to digital books, and over time diminish the library as a democratic institution that provides broad collections to everyone.

In the spring of 2020, when [nearly all](#) libraries suddenly closed because of the coronavirus pandemic, the Internet Archive, a nonprofit that preserves and provides open access to a wide range of media online, and which is designated as a library in its home state of California, expanded a program that allows those who have registered on its website to electronically borrow scanned copies of printed books in its possession. Although many of these digitized books were still in copyright, the Internet Archive asserted the justness of this program not only by the special circumstances of shutdowns but also by appealing to a novel concept called [Controlled Digital Lending](#) (CDL).

CDL, developed as a legal theory a bit more than a decade ago by the Georgetown University professor and law librarian Michelle Wu, asserts that libraries have a right to create digital surrogates for their collections, enabling each library to loan out either the digital version or the hard copy of any material it owns (but not both at the same time). To its advocates, CDL represents an extension of normal library operations from the physical to the digital realm, and a helpful service to library patrons. For publishers, CDL represents an unruly library practice and a threat to their profits.

On Friday, the judge sided almost entirely with the publishers. The Internet Archive “argues that its digital lending makes it easier for patrons who live far from physical libraries to access books and that it supports research, scholarship, and cultural participation by making books widely accessible on the Internet,” Judge John G. Koeltl [wrote](#) in his pointed ruling. “But these alleged benefits cannot outweigh the market harm to the Publishers.”

The Internet Archive plans to appeal the ruling, but if the decision stands, libraries will lose the agency to digitize and lend the print books they have collected and stewarded, and instead will have to defer to, and pay, publishers for separate digital editions of in-copyright books. Over time, this ruling may change the very nature of libraries—how they operate, their finances, whom they are able to serve, and the breadth of their collections.

Nearly all forms of human expression are now consumed mostly via the transmissible bits that assemble themselves into the words you are reading. Vinyl may be having a vogue resurgence, but most music listeners use streaming services. Newspapers that survived the digital transition may still have a print edition, but most subscribers read their news in a web browser or on a handheld device.

## **Recommended Reading**

Books, by contrast, have been stuck in a more partial metamorphosis. In 2021, about [30 percent of Americans](#) reported that they had read an e-book, up from 25 percent in 2019. That represents a

significant part of the market for books, but many people still find acquiring e-books hard, [don't like the current experience of reading them](#), or can't find a desired book in a digital version.

If you want to read a physical book, you have many options: a local library, an independent bookstore, a Barnes & Noble, and many online booksellers, Amazon the largest among them.

If you want to read that same book in a digital edition, the options are far more limited. You can buy it in an instant from Amazon, which is even more dominant in e-books than print books, or you can borrow it from your local library, to which I say: good luck. Anyone who has used a library app such as Libby will be familiar with the long wait times for many e-books; hold queues stretch on for months—if a digital copy exists at all.

Publishers seem to be doing just fine with this friction around digital library books. After a brutal decline following the Great Recession, print-book sales [are up 33 percent](#) in the past 10 years. If the high costs and complexity of the e-book market for libraries pushes more readers to purchase print books (or e-books), that is a feature, not a bug, for the publishers.

This is a challenging state of affairs for librarians, however, who seek to serve readers of all means in equitable ways. Libraries have dramatically increased their spending on e-books but still cannot come close to meeting demand, which unsurprisingly rose during the pandemic. Because publishers view each circulation of a library e-book as a potential missed sale, they have little incentive to reduce costs for libraries or make it easier for libraries to lend digital copies.

All digital transitions have had losers, some of whom we may care about more than others. Musicians seem to have a raw deal in the streaming age, receiving fractions of pennies for streams when they used to get dollars for the sales of physical media. Countless regional newspapers went out of business in the move to the web and the disappearance of lucrative classified advertising. The question before society, with even a partial transition to digital books, is: Do we want libraries to be the losers?

Unfortunately, it is looking like they will be, and this ruling represents another serious loss. Most libraries do not even own e-books in the true sense of ownership. The best they can do is to license e-books for a limited time, or for a limited number of circulations, before they have to pay again. Even with these restrictions, e-book prices for libraries are much higher than for individuals—[up to four times as much](#) for a two-year, rather than a perpetual, license. Librarians are thus forced to make painful decisions: Should the library have a diverse collection, with a wide variety of authors and genres, or license many copies of the most popular books to reduce those long wait times? The worst part is that if libraries stop paying each year to renew e-book licenses, those e-books will simply disappear, unlike the books on the shelves.

This led to the central question behind the lawsuit: Libraries have stored and cared for physical books for decades, and if readers are becoming more comfortable with online formats, why can't a library

digitize the volumes it owns and loan the digital copies in lieu of the physical ones?

Controlled Digital Lending emerged as a powerful, appealing answer to that question. Under CDL, libraries retain physical copies of books when the e-book edition is checked out, so it is as though only one copy exists, though it exists both digitally and physically, maintaining a 1:1 “owned to loaned” ratio. The e-books are wrapped in a digital lock to prevent further copying or distribution and self-destruct after the period of the loan is over.

CDL is useful for when a reader might be distant from a library or prefer a digital edition to a print one. A good portion of many large library collections, such as my own at Northeastern University, are stored in remote storage facilities these days, while many libraries serve widely distributed community members (we have 14 campuses in three countries). Scanning and transmitting a book file via the internet is more efficient and eco-friendly than shipping a print book both ways. (Northeastern also licenses well more than 1 million e-books.)

This theory was primarily academic—literally and figuratively—until the pandemic began and the Internet Archive enlarged its CDL program. Publishers had been uneasy about CDL since its inception, but notably, despite the Internet Archive’s use of CDL for years, including before COVID, publishers filed a lawsuit only when the Internet Archive briefly went beyond the 1:1 ratio, allowing multiple copies of each book it possessed to circulate. In their public statements and filings with the court, the plaintiff publishers—Hachette, HarperCollins, Wiley, and Penguin Random House—backed by the Association of American Publishers, nevertheless sought to discredit CDL entirely.

This framing and timing by the publishers and their lawyers was clearly designed to put CDL in the most negative light, but if we pull back the camera to observe the wider, rockier landscape for digital books, we can understand the discontent of libraries and their interest in CDL. Libraries paid for their print books and some now wish to use them in a different format, under the same rules, rather than pay for the books again in a new medium—or, really, to *rent* them. And because libraries generally do not take possession of the e-book files they rent from publishers, their crucial role as long-term preservers of culture has been severed from their role as institutions that provide democratic access—a striking change.

Those of us in academic libraries have seen this film before. Two decades ago, we started to shift our collection spending to digital versions of scholarly resources. Physical journals on the shelves turned into e-journals; buying became renting. Then the publishers raised the prices for these licenses year after year, and the cost of digital surrogates quickly became a significant budget line, then a majority of spending on collections, then 90 percent or more of what a research library spends in a year for academic materials. This shift in our financial spreadsheets happened in tandem with a shift in what we have and what we do as librarians. E-journals, especially those in the scientific, technical, and medical fields, with exorbitant licenses, crowded out resources in other fields, such as the humanities.

This story arc is now being replicated at public libraries with e-books. As they argued in court, publishers believe that libraries should simply spend more on licenses. But public libraries have highly constrained budgets, and in the pursuit of shorter hold queues, this spending will naturally gravitate toward multiple copies of the same e-books, a sliver of the book market—high-demand genres, recently released books, and best sellers—thereby reducing the library’s scope.

Why not spend collection funds instead on print books? Doesn’t most of the public still prefer print to digital? That may be true for now in public libraries, but look at what has happened in academic libraries: [The books on the shelves have largely turned into wallpaper](#) as students and faculty have become more comfortable with digital formats. If public libraries follow the same trajectory, in the future they will become shells of their former selves: renters of small collections rather than owners of large ones.

In short, if Controlled Digital Lending sought to provide an alternative pathway for the possession and use of digital books, it did so only after a new, highly constrained marketplace arose that disadvantages the mission of libraries. The frustration libraries feel about this state of affairs has reached a high enough level that [bills](#) are making their way through a number of state legislatures trying to regulate the library-e-book market. Last year also saw the launch of a library-centric nonprofit marketplace for e-books, [The Palace Project](#).

Libraries and librarians are not rule breakers, but they are passionate about their mission, and these initiatives are a sign of the intensity of their dismay. The Internet Archive is as close as we get to the aggressive Silicon Valley stereotype of asking for forgiveness rather than permission. But it is worth remembering that had the Internet Archive not started copying and preserving websites in the 1990s without such permission, a significant part of human expression over the past three decades would have been lost forever. Undoubtedly many writers use the riches of the Internet Archive for their own work and value the access it provides to multiple media. If the Internet Archive slightly overstepped in this case, suing it in response seems like an even bigger overstep, using the lawsuit to permanently discredit CDL, which some libraries see as helpful for their scattered patrons.

Right now even the most retiring librarian will tell you that the ecosystem for books is out of balance, and CDL is one small attempt to level the playing field between those who produce and distribute books and those who steward them for many years after publication. A sensible compromise would be to permit the original, modest version of CDL while restricting multiple simultaneous circulations from one physical copy. With its PDF scans and broad focus, including on the long list of books that do not have digital surrogates, a library-based program for digitized books is not much of a threat to the modern, tailored e-book formats that readers prefer for recent works.

State-based legislative attempts to make the e-book market more reasonable for libraries may also fail—a Maryland bill [was struck down](#) by a federal judge last year after publishers furiously objected.

Last week in court, a lawyer for the publishers argued that libraries could always go to the U.S. Congress to change the law in their favor, which seemed especially cold. Perhaps a library-e-book rider could be tucked into a bill to raise the debt ceiling? Should the publishers win across the board, publishers' profits may improve slightly, and writers may see some incremental income.

In the long run, however, maybe not. After all, libraries are where the love of reading is inculcated, and hurting libraries diminishes the growth of new readers, which in turn may reverse the recent upward trend in book sales. This will be particularly true for communities with fewer resources to devote to equitable access. Ultimately, we should all seek to maximize the availability of books, through as many reasonable methods as we can find. The library patron who is today checking out an e-book, or a digitized book through Controlled Digital Lending—should the practice be upheld on appeal—will be the enthusiastic customer at the bookstore tomorrow.

*Dan Cohen is the Vice Provost for Information Collaboration, Dean of the Library, and Professor of History at Northeastern University.*

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